

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-2131

76-2144

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. '76-2131
Docket No. 76-2144

UNITED STATES ex rel. EDWARD FARRELL,

Petitioner-Appellant,

-against-

JACK CZARNETZKY, Superintendent of Eastern
Correctional Facility,

Respondent-Appellee.

UNITED STATES ex rel. CHAUNCEY REIDOUT,

Petitioner-Appellee,

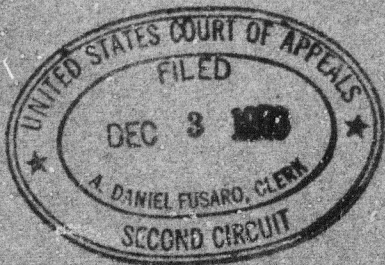
-against-

ROBERT HENDERSON, Superintendent of Auburn
Correctional Facility,

Respondent-Appellant.

ON APPEAL FROM TWO DECISIONS IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR REIDOUT V. HENDERSON



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee-Appellant
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New York, New York 10047
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PAGINATION AS IN ORIGINAL COPY

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PLAINTIFFS

DEFENDANTS FRANKEL, J.

CHAUNCEY REIDOUT

ROBERT J. HENDERSON, SUP'T OF
AUBURN CORRECTIONAL FACILITY

10/26

FW

CAUSE
Petition for Writ of Habeas Corpus - 28 U.S.C. §2254

ATTORNEYS

Legal Aid Society
Criminal Appeals Bureau
12 Park Row NYC 10038
577-3420Louis J. Lefkowitz, Atty Gen. M.
2 World Trade Center NYC 10024
488-429710-2-14
A☒ CHECK
HERE
IF CASE WAS
FILED IN
FORMADATE
AUG 26 1975

FILING FEES PAID

RECEIPT NUMBER
JEP

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED

JS-5 X

PROCEEDINGS

- 6-76 Filed Petition for Writ of Habeas Corpus. Summons issued
- 8-26-76 Filed Order permitting Petitioner to proceed in forma pauperis.....
WERKER, J.
- 8-26-76 Filed Petitioner's notice of Motion directing that he be released
from custody of the Respondent unless the state conducts a new trial
within 60 days. Ret. 9-10-76.
- 8-26-76 Filed Petitioner's memo of law in support of petition.
- 9-10-76 Filed defts affdvt in opposition to petitioner's application for a
of habeas corpus.
- 9-10-76 Filed defts memo of law in opposition to petitioner's application for
a writ of habeas corpus.
- 10-13-76 Filed Memorandum & Order that for the reasons indicated, petitioner's
petition is granted, & he is ordered to be released unless he is granted
a retrial or resentenced as aforesaid within sixty days. The court
grants a stay of this order pending an expeditious appeal, etc. The
foregoing embraces the order of this court. No settlement or further
action is necessary.....FRANKEL, J. n/m & copy sent to petitioner by
Docket Clerk.
- 10-26-76 Filed Respondents notice of appeal to the USCA from the decision &
order dtd 10-13-76 granting the petition for habeas corpus & ordering
petitioner to be released unless he is granted a retrial or resented.
Copy sent to: William E. Hellerstein, & William E. Gallagher, The
Legal Aid Society, 15 Park Row, 18th Floor, New York, N.Y. 10038.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By M. H. L.
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CHAUNCEY REIDOUT,

Petitioner,

-against-

ROBERT J. HENDERSON, Superintendent
of Auburn Correctional Facility,

Respondent.
-----X

NOTICE OF APPEAL

76 Civ. 3836
M.E.F.

Notice is hereby given that Robert J. Henderson, respondent abovenamed, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order granting the petition for habeas corpus and ordering the the petitioner to be released unless he is granted a retrial or resented for robbery in the second degree within sixty days, which said decision and order was entered in this action on October 13, 1976.

Dated: New York, New York
October 25, 1976

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
by

Charles A. Bradley
CHARLES A. BRADLEY
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-4940

TO: CLERK
United States District Court
for the Southern District of New York

WILLIAM E. HELLERSTEIN
WILLIAM G. GALLAGHER
The Legal Aid Society
15 Park Row, 18th Floor
New York, New York 10038

COPY OF THE WITHIN PAPER

RECEIVED UNITED STATES DISTRICT COURT
DEPARTMENT OF SOUTHERN DISTRICT OF NEW YORK

JUDGE FRANKEL

AUG 26 1976

76 CIV. 3336

NEW YORK CITY OF CHAUNCEY REIDOUT,

ATTORNEY GENERAL

Petitioner, :

-against-

: PETITION FOR
WRIT OF HABEAS
CORPUS

ROBERT J. HENDERSON, SUPERINTENDENT
OF AUBURN CORRECTIONAL FACILITY,

:
76 Civ.

Respondent. :

-----X
STATE OF NEW YORK)
COUNTY OF CAYUGA) ss.:

Chauncey Reidout, being duly sworn, deposes and says:

1. I am currently in the custody of the respondent, Superintendent of Auburn Correctional Facility at Auburn, New York, pursuant to a judgment of the Supreme Court, Bronx County, rendered May 29, 1974 convicting me after trial of the crime of robbery in the first degree [P.L. §160.15(4)] and sentencing me to an indeterminate term of imprisonment with a maximum of fifteen years and a minimum of five years. I appealed this conviction as a poor person with assigned counsel. The Appellate Division, First Department, on November 13, 1975, affirmed the judgment. Leave to appeal to the Court of Appeals was denied by Judge Sol Wachtler on February 4, 1976.

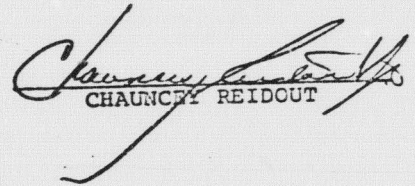
2. I was convicted of robbery in the first degree for having forcibly stolen property in an incident in which I allegedly "displayed what appeared to be a pistol, revolver or other firearm." [Ind. No. 3642/73]. The weapon was never introduced into evidence, nor was any evidence presented as to whether or not it was either loaded or operable.

3. Since Penal Law, §160.15(4) placed the burden upon me to prove by a preponderance of the evidence that the weapon used in the robbery was not loaded or was inoperable to reduce the charge from robbery in the first degree to robbery in the second degree [P.L. §160.10], that statute violates the Due Process Clause of the Fourteenth Amendment. See Mullaney v. Wilbur, 421 U.S. 684 (1975).

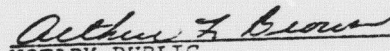
4. This issue was fully presented before the Appellate Division, First Department and before Judge Wachtler.

5. Our legal and factual arguments are discussed in further detail in the accompanying memorandum.

WHEREFORE, petitioner respectfully asks that this Court direct that he be released from the custody of the superintendent of Auburn Correctional Facility unless a new trial is conducted within 60 days.


CHAUNCEY REIDOUT

Sworn to before me this
27 day of July, 1976


NOTARY PUBLIC

ARTHUR F. BROWN
NOTARY PUBLIC STATE OF NEW YORK
MADISON COUNTY NO. 4622755
COMMISSION EXPIRES MARCH 30, 1978

5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
CHAUNCEY REIDOUT,

Petitioner,

-against-

ROBERT J. HENDERSON, SUPERINTENDANT
OF AUBURN CORRECTIONAL FACILITY,

Respondent,
-----x

AFFIDAVIT

STATE OF NEW YORK)

COUNTY OF CAYUGA)

ss.: -

Chauncey Reidout being duly sworn, deposes and says:

That deponent is the petitioner in the above-captioned proceedings; that deponent has read the foregoing petition and knows the contents thereof; that the same are true to deponent's own knowledge.

Chauncey Reidout
CHAUNCEY REIDOUT

Swon to before me this

27 day of July, 1976

Arthur F. Brown
NOTARY PUBLIC

ARTHUR F. BROWN
NOTARY PUBLIC STATE OF NEW YORK
MADISON COUNTY NO. 4622755
COMMISSION EXPIRES MARCH 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
CHANCEY REIDOUT,

Petitioner,

-against-

ROBERT J. HENDERSON,

Superintendent of Auburn Correctional
Facility,

Respondent.
----- -x

:
:
:
: 76 Civ. 3836
:

: MEMORANDUM
:
:

FRANKEL, D.J.

The petitioner, having exhausted state remedies, raises an interesting question of law which has already been before another Judge of this Court in another habeas proceeding. Briefly stated, the question is whether the rule of Mullaney v. Wilbur, 421 U.S. 684 (1974), elaborating the principle of In re Winship, 397 U.S. 358 (1969), is violated by the provisions of the New York Penal Law, §§160.15 and 25.00, which make it "an affirmative defense" that a firearm used in a robbery was unloaded, placing upon the defendant the burden of establishing such a defense as a means of reducing the crime from first to second degree robbery.

The importance of that defense is substantial; the maximum sentence for robbery in the second degree is 15 years, the maximum for robbery in the first degree being 25 years.

While the question is interesting, the materials for answering it are not extensive. Moreover, the position has been exhaustively briefed, and the question is already pending on appeal before the Second Circuit in the case of Farrell v. Czarnetsky, 76 Civ. 2355. In these circumstances, it becomes wasteful and superfluous for this court to write at length. It seems sufficient to say that, after full deliberation, and with the utmost deference, this court finds itself in disagreement with the decision of Judge Metzner in the Farrell case. For the reasons exhaustively announced in the brief filed on behalf of petitioner, this court concludes that the doctrine of Mullaney v. Wilbur, supra, is squarely controlling, and that the device of an affirmative defense here in question is invalidated by that controlling authority. Here, as in Mullaney, the procedural arrangement, with the transferring of a weighty burden of proof to the defendant, "denigrates the interests found critical in Winship." 421 U.S. at 684. The matter is not to be resolved by manipulating "elements" of offenses or determining whether we deal with a single crime or two. Id. at 698-99. We are commanded to deal with "substance rather than . . . formalism." Id. at 699.

Applying these principles, as they are more fully and sufficiently explicated in the brief for petitioner, this court concludes that the writ should issue.

The form of the relief would seem to require some tailoring to the particular details of the question presented and the remedy sought. It would appear that petitioner's substantial interests, under the ruling announced herein, would be served either by a new trial or by a resentencing for robbery in the second degree rather than for robbery in the first degree. Accordingly, the petition is granted, and petitioner is ordered to be released unless he is granted a retrial or resentenced as aforesaid within sixty days. Serving the ends of realism and good order, the court also grants a stay of this order pending an expeditious appeal or some appropriate arrangement to abide the outcome of Farrell v. Czarnetsky, supra, an alternative counsel are invited to consider and discuss.

The foregoing embraces the order of this court. No settlement or further action is necessary.

Dated, New York, New York

October 13, 1976

MARVIN E. FRANKEL

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
CHAUNCEY REIDOUT, :
Petitioner-Respondent, :
-against- : NOTICE OF MOTION
ROBERT J. HENDERSON, : T. 6678
Superintendent of Auburn
Correctional Facility, :
Respondent-Appellant, :
-----X

S I R S :

PLEASE TAKE NOTICE, that upon the decision of the District Court, (Frankel, J.), dated October 13, 1976 herein, the decision of the District Court, (Metzner, J.) dated August 4, 1976 in Farrell v. Czarnetsky, 76 Civ. 2355, and the affidavit of Charles A. Bradley, sworn to the 29th day of October, 1976, the United States Courthouse, on September 28, 1976 at 10:30 A.M. for an order consolidating this appeal with the appeal in Farrell v. Czarnetsky, 76 Civ. 2355, on the grounds that the issue involved in both appeals is the same, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 3, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellant,
Henderson
Office & P.O. Address
Two World Trade Center
New York, New York 10047

TO: WILLIAM E. HELLERSTEIN
WILLIAM G. GALLAGHER
The Legal Aid Society
15 Park Row, 18th Floor
New York, New York 10038

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
CHAUNCEY REIDOUT, :
Petitioner-Respondent, :
-against- : AFFIDAVIT
ROBERT J. HENDERSON, : T. 6578
Superintendent of Auburn
Correctional Facility, :
Respondent-Appellant, :
-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CHARLES A. BRADLEY, being duly sworn, deposes and
says:

1. Deponent is an Assistant Attorney General in the
office of LOUIS J. LEFKOWITZ, Attorney General of the State of
New York, attorney for the respondent-appellant herein, and
makes this affidavit in support of his motion to consolidate the
appeal herein with the appeal in Farrell v. Czarnetsky, 76 Civ.
2355.

2. The petitioner-respondent in this case was
convicted in Supreme Court, Bronx County on May 29, 1974 of
robbery in the first degree (P.L. § 160.15[4]).

3. The petitioner-respondent in Farrell v. Czarnetsky
was convicted in Supreme Court, New York County on June 4, 1974
of robbery in the first degree (P.L. § 160.15[4]).

4. P.L. § 160.15 (in pertinent part) reads as
follows:

"A person is guilty of robbery in
the first degree when he forcibly
steals property and when, in the

course of the commission of the crime, or of immediate flight there from, he or another participant in the crime".

* * *

"4. Displays what appear to be a pistol, revolver, or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver or other firearm was not a loaded weapon from which a shot readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of robbery in the second degree, robbery in the third degree or any other crime".

5. Robbery in the first degree is a Class B felony carrying a maximum 25 year sentence. Robbery in the second degree is a Class C felony with a 15 year maximum.

6. Farrell v. Czarnetsky holds that the affirmative defense provision of the statute is constitutional; the Court below in this case held it is not."

7. Counsel^{for} for the appellant in Farrell v. Czarnetsky and in this case are the same and have consented to consolidation.

WHEREFORE, deponent prays for an order consolidating this case with the case of Farrell v. Czarnetsky for purposes of appeal.

Charles A. Bradley
CHARLES A. BRADLEY
Assistant Attorney General

Sworn to before me this
3rd day of November, 1976

S/ CARL JUKS
Assistant Attorney General
of the State of New York

B-13
76-2131

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of November, one thousand nine hundred and seventy-six.

Edward Farrell,
Petitioner-Appellant.

v.

Jack Czarnetsky, Superintendent of Eastern
Correctional Facility,
Respondents-Appellees.

It is hereby ordered that the motion made herein by counsel for the

appellant

~~appellee~~

~~respondent~~

~~respondent~~

by notice of motion dated November 3, 1976, to consolidate the appeal herein with the appeal in Docket No. 76-2144

on consent

be and it hereby is granted, and ~~denied~~ that the scheduling order dated October 19, 1976 in Dkt. 76-2131 be complied with except that the record may be filed by November 15, 1976.

~~It is further ordered that~~

William E. Timbony Circuit Judges

